Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
CELLULAR SOUTH LICENSES, INC.	)	
	)	CC Docket No. 96-45
Petition for Designation as an	)	
Eligible Telecommunications Carrier	)	
in the State of Alabama	)	

To: The Commission

REPLY COMMENTS OF CELLULAR SOUTH LICENSES, INC.

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SUMMARY

Cellular South Licenses, Inc. ('Cellular South") is responding to the comments filed by CenturyTel of Alabama, LLC, CenturyTel of Eagle, Inc. and CenturyTel, Inc. (collectively "CenturyTel"), the Alabama Rural Local Exchange Carriers ("ARLECs"), and the Verizon telephone companies with respect to the designation of Cellular South as a competitive, eligible telecommunications carrier ("CETC") by the Wireline Competition Bureau ("Bureau"). *See Cellular South Licenses, Inc.*, 17 FCC Rcd 24393 (Wireline Comp. Bur. 2002). The issue of whether Cellular South's designation as a CETC was proper is before the Commission pursuant to an application for review of the Bureau's action filed the ARLECs. The ARLECs supplemented their pending application for review after the Bureau departed from § 1.115(d) of the Commission's Rules ("Rules") to invite parties prosecuting applications for review to address the Commission's decisions in *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004) and *Highland Cellular, Inc.* 32 Communications Reg. (P&F) 233 (2004).

The Bureau violated § 1.115 of the Rules and exceeded the scope of its delegated authority when it: (1) failed to abide by the procedures required by § 1.115 to be employed once an application for review is filed; (2) invited a supplement to an application for review to be filed after the expiration of the 30-day filing period of § 1.115(d); (3) effectively reopened the record of an adjudicatory proceeding to permit at least two non-parties to participate without establishing their statutory and administrative standing as aggrieved parties; and (4) disregarded the statutory and regulatory prohibition against raising matters in an application for review that were not passed upon by the subordinate authority.

In addition to violating § 1.115 of the Rules, the Bureau violated § 1.1208 of the *ex parte*

rules by inviting *ex parte* presentations to be made in a restricted proceeding involving an application for review of the grant of a valuable ETC designation.

Contrary to CenturyTel's claim, the Commission's power to impose new designation requirements on a CETC is limited by the § 254(a) of the Communications Act of 1934 ("Act"), § 553 of the administrative Procedure Act ("APA"), § 1.115(c) of the Rules, and ultimately by procedural due process. The plain language of § 254(a) of the Act mandates that all new universal service rules emanate from the recommendations of the Federal-State Joint Board on Universal Service ("Joint Board") following a notice and opportunity for public comment. However, in *Virginia Cellular* and *Highland Cellular*, the Commission bypassed the Joint Board and avoided the notice-and-comment rulemaking requirements of § 254(a) of the Act and § 553 of the APA by adopting new ECTC designation rules, as well as changing existing designation rules, by adjudication.

Assuming the new CETC designation rules are enforceable at all, the retroactive application of the *Virginia Cellular* and *Highland Cellular* rules to disturb Cellular South's CETC designation would violate § 155(c) of the Act and § 1.115(c) of the Rules, which prohibit the grant of an application for review that raise matters that were not passed upon by the Bureau. Moreover, because the Commission substituted new CETC designation rules in *Virginia Cellular* and *Highland Cellular* for rules properly promulgated in a § 254(a) notice-and-comment rulemaking, the retroactive application of those new rules to deprive Cellular South of the high-cost support it currently receives would work a manifest injustice in violation of procedural due process.

In *Virginia Cellular*, the Commission repudiated an interpretation of § 214(e)(6) of the Act that it adopted in its 1997 rulemaking to implement the Telecommunications Act of 1996 ("1996

Act"). That interpretation comported with the pro-competitive goal of the 1996 Act to open even high-cost telecommunications markets to competition. Prior to *Virginia Cellular*, the Commission reasonably interpreted the 1996 Act as providing that the designation of a CETC for a non-rural area would be *per se* consistent with the public interest so long as the applicant established its eligibility under § 214(e)(1). The statute should be viewed as creating a conclusive presumption that designation of a CETC in a non-rural area would serve the public interest and a rebuttable presumption in the case of a CETC designation in a rural area. The Commission's repudiation of its interpretation of § 214(e)(6) in *Virginia Cellular* is wholly inconsistent with the language of the statute and the pro-competitive goal of the 1996 Act. The Commission's new reading of § 214(e)(6) abrogates the statutory presumption in favor of placing the burden on the applicant to prove that its designation as a CETC for a non-rural area would be consistent with the public interest.

The comments filed by the ARLECs represent the third time they failed to carry their burden of demonstrating that the *termination* of Cellular South's high-cost support is warranted under § 1.115. They trotted out the same evidence rejected by the Bureau to allege that the designation of multiple wireless CETCs could cause unspecified "harms" to a rural LEC. However, they failed once again to allege that the Bureau erred when it found their evidence insufficient to make a *prima facie* case of competitive harm. And once again they made no specific allegations of fact sufficient to show that the designation of Cellular South as a CETC has produced, or will produce, any harms whatsoever.

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REPLY COMMENTS OF CELLULAR SOUTH LICENSES, INC.

Cellular South Licenses, Inc. ("Cellular South"), by its attorneys, and pursuant to the procedures announced by the Wireline Competition Bureau ("Bureau") by public notice issued on April 12, 2004,[1] hereby responds to the comments filed by CenturyTel of Alabama, LLC, CenturyTel of Eagle, Inc. and CenturyTel, Inc. (collectively "CenturyTel"), the Alabama Rural Local Exchange Carriers ("ARLECs"), and the Verizon telephone companies ("Verizon") with respect to the designation of Cellular South as an eligible telecommunications carrier ("ETC"). *See Cellular South Licenses, Inc.*, 17 FCC Rcd 24393 (Wireline Comp. Bur. 2002).

I. The *Ad Hoc* Proceeding To Update The Record Conflicts With The Commission's Rules And Should Be Terminated

A. The Bureau Violated § 1.115 Of The Rules By Inviting A Supplement To An Application For Review Of Its Own Action

The Commission delegated authority to the Bureau to designate an ETC under § 214(e)(6) of the Communications Act of 1934, as amended ("Act"). *See Procedures for FCC Designation of ETCs Pursuant to Section 214(e)(6) of the Act*, 12 FCC Rcd 22947, 22948 (1997) ("*Section 214(e)(6)*

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[1] *See Parties are Invited to Update the Record Pertaining to Pending Petitions for ETC Designations*, DA 04-999, at 1 (Wireline Comp. Bur. Apr. 12, 2004) ("*Update PN*").

PN"). However, § 155 of the Act does not permit the Commission to delegate the function of acting upon an application for review of the Bureau's designation of an ETC. *See* 47 U.S.C. § 155(c)(1). Thus, the authority to act on such applications has been withheld from the Bureau by rule. *See* 47 C.F.R. § 0.291(d).

The ARLECs filed an application for Commission review of the Bureau's designation of Cellular South as a competitive ETC ("CETC"), and they sought review expressly pursuant to § 1.115 of the Commission's Rules ("Rules").[2] Under that rule, only parties "aggrieved" by the Bureau's action could file an application for review as a matter of right. *See* 47 C.F.R. § 1.115(a). *See also* 47 U.S.C. § 155(c)(4). A party that had not participated in the proceedings before the Bureau could seek Commission review if: (1) it described "with particularity" the manner in which it was aggrieved by the designation of Cellular South , and (2) showed good reason why it had not participated in the "earlier stages" of the proceeding. 47 C.F.R. § 1.115(a). Moreover, § 1.115(d) provides that an "application for review and any supplement[] thereto shall be filed within 30 days of public notice" of the action of which review is sought. *Id.* § 1.115(d).

The Commission is empowered to delegate functions to the Bureau by § 155(c) of the Act, which also provides that "no application for review shall rely on questions of fact or law" upon which the delegated authority "has been afforded no opportunity to pass." 47 U.S.C. § 155(c)(5). Accordingly, § 1.115(c) of the Rules flatly prohibits the grant of an application for review "if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c).

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[2] *See* Application for Review of the ARLECs, CC Docket No. 96-45, at 1 (Dec. 23, 2002) ("Application.").

Under the *Accardi* doctrine,[3] the Commission must abide by its own rules, *Reuters Limited v. FCC*, 781 F.2d 946, 947 (D. C. Cir. 1986), as well as its "established and announced procedures." *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Therefore, the Commission's consideration of the Application must be governed primarily by § 1.115 of the Rules. The procedures set forth in that rule, not those of the Bureau's design, must apply. And pursuant to § 1.115(d), the "record" should have closed in this proceeding with the filing of a reply pleading by the ARLECs on January 24, 2003.

The Bureau first departed from § 1.115 on January 10, 2003, when it initiated its own consolidated proceeding involving the appeal in this case with the ARLECs' application for review of its ETC designation order in *RCC Holdings, Inc.*, 17 FCC Rcd 23532 (Wireline Comp. Bur. 2002).[4] Departing still further from § 1.115, the Bureau established its own pleading cycle for "comments" on the two applications for review.[5]

The Bureau departed from § 1.115 once again when it issued its *Update PN* inviting the ARLECs to supplement their Application. *See* ARLECs' Comments, at 2 n.3. The Bureau compounded its error by purporting to act pursuant to §§ 1.415 and 1.419 of the Rules, which apply only in "notice and comment rulemaking proceedings conducted under 5 U.S.C. 553." 47 C.F.R. § 1.399. The process by which Cellular South was designated as a CETC constituted an informal

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[3]The *Accardi* doctrine holds that government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-28 (1954); *Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32, 34 n.3 (D.D.C. 1998).

[4]*See Pleading Cycle Established for Comments Regarding Applications for Review of Orders Designating ETCs in the State of Alabama*, 18 FCC Rcd 97, 97 (Wireline Comp. Bur. 2003) ("*First Comment PN*").

[5]*See id.*

adjudication under 5 U.S.C. §§ 551(7) and 555(b).[6] Moreover, a Bureau order designating a CETC cannot possibly be issued in a rulemaking proceeding,[7] and §§ 1.415 and 1.419 by their own terms do not apply to an application for review.[8]

The Bureau's failure to adhere to § 1.115 and the limits of its delegated authority is highly prejudicial. The Bureau's action thwarted the purpose of § 155 of the Act, which was to enable the Commission "to handle its large workload of adjudicatory cases with greater speed and efficiency." *Amendment of The Commission's Rules of Practices and Procedures*, 46 Radio Reg. 2d (P&F) 524, 528 (1979). Thus, § 1.115 was intended to shorten the adjudicatory process, yet give a party an adequate opportunity to make its case to the Commission. *See id.* at 529. Although the rule gives parties "at least two bites at the apple," the Bureau lengthened the process by giving the ARLECs two extra bites at the apple.[9] And it added to the complexity of the adjudication by giving first bites to CenturyTel and Verizon, neither of whom were parties to the proceeding.

By its departure from the Rules, the Bureau effectively reopened the record of an adjudicatory

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[6]Section 254(a) of the Act provides that "only an [ETC] designated under section 214(e) shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(a). Designation as an ETC is a "license" under the Administrative Procedure Act ("APA"), because it serves as the Commission's "permit, certificate, approval . . . or other form of permission" to receive federal universal service support. 5 U.S.C. § 551(8). Under the APA, the process by which the Commission grants a "license" to receive universal service support constitutes "licensing." *Id.*§ 551(9). Thus, it is a "process for the formulation of an order," *id.* § 551(7), "in a matter other than rule making but including licensing." *Id.* § 551(6). Therefore, the process is an "adjudication" under the APA. *See id.* § 551(7).

[7]The Commission has delegated no authority to the Bureau to issue orders in rulemaking proceedings. *See* 47 C.F.R. § 0.291(e). Obviously, therefore, the Bureau cannot issue an order designating a CETC in a rulemaking proceeding. Likewise, no party can be aggrieved by a Bureau order issued in a rulemaking proceeding pursuant to delegated authority, and there can be no application for Commission review of any such Bureau order. *See id.* § 1.115(a).

[8] Sections 1.415 and 1.419 apply "[a]fter a notice of proposed rulemaking ["NPRM"] is issued." 47 C.F.R. § 1.415(a). NPRMs are not issued in the ETC designation process.

[9]See Supplement to Application for Review of the ARTECs, CC Docket No. 96-45 (May 14, 2004) ("Supplement"). The Supplement also appears as Exhibit A to the ARLECs' comments.

proceeding to permit at least two non-parties to participate. It allowed "interested parties" to participate without showing with particularity how they were aggrieved by the Bureau's CETC designation order and without providing good reason for not participating earlier in the proceeding. *But see* 47 C.F.R. § 1.115(a). Thus, CenturyTel and Verizon have been allowed to participate without establishing their standing as aggrieved parties under the Act, as well as under § 1.115(a). *See* 47 U.S.C. § 155(c)(4).

The Bureau invited the ARLECs to supplement their application for Commission review, and permitted CenturyTel and Verizon to implicitly urge the Commission to review the Bureau's action, long after the expiration of the 30-day deadline to file or supplement an application for review. *See* 47 C.F.R. § 1.115(d). As a result, the ARLECs can argue blithely that the Supplement was not untimely because it was filed at the "Commission's express invitation," and not pursuant to § 1.115. ARLECs' Comments, at 2 n.5.[10]

When it encouraged the ARLECs to supplement their application for review, the Bureau disregarded a Commission deadline "designed to bring a prompt and final resolution to matters before [it]."[11] Moreover, it apparently accepted the ARLECs' late-filed Supplement,[12] thereby effectively relieving them of their burden to either request a waiver of § 1.115(d) or submit a motion

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[10]We note that the invitation was extended by the Bureau under delegated authority and not by the Commission. *See Due Date Extended for Reply Comments Concerning Supplemented Petitions for ETC Designations*, DA 04-1628 (Wireline Comp. Bur. June 3, 2004); *Update PN*, at 1.

[11]*21st Century Telesis Joint Venture*, 16 FCC Rcd 17257, 17263 (2001), *aff'd*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (constitutional claim made in a timely petition for Commission reconsideration was not considered, because claim was first presented in a supplement to a petition for bureau reconsideration filed after expiration of the 30-day deadline of § 1.106(f)).

[12]*See generally Citicasters Licenses, Inc.*, 17 FCC Rcd 1997, 1997 n.2 (2002); *BDPCS, Inc.*, 15 FCC Rcd 17590, 17596-97 (2000).

for leave to file the Supplement showing good grounds on which leave may be granted.[13]

CenturyTel and Verizon have been allowed to weigh in on the merits of *Cellular South* despite their failure to present "*any* excuse" for their failure not raising their supplemental arguments in a timely manner,[14] or to offer any "plausible explanation" as to why those arguments were not made before the Bureau or in a timely application for review.[15] Verizon's failure in that regard is particularly significant, because its comments also constitute an untimely, *ex parte* opposition to the petition for reconsideration of *Virginia Cellular*[16] filed by Sprint Corporation ("Sprint"). *See* Verizon Comments, at 6-14 & nn. 12, 19, 20.[17]

The Bureau may have gone so far as to ask the ARLECs to supplement their Application for "with any new information or arguments they believe relevant" under *Virginia Cellular* and *Highland Cellular*.[18] *Update PN*, at 2. That broad request flew in the face of the statutory and regulatory prohibition against raising matters in an application for review that were not passed upon by the subordinate authority. *See* 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c). And it was prejudicial to Cellular South to the extent the ARLECs managed to raise such new matters in their

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[13] *See Warren C. Havens*, 17 FCC Rcd 17588, 17593 & n.53 (2002); *Carol Sue Bowman*, 6 FCC Rcd 4723, 4723 n.1 (Mass Media Bur. 1991). *Cf. Charles T. Crawford*, 17 FCC Rcd 2014, 2018 n.44 (2002).

[14] *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (emphasis in original).

[15] *21st Century*, 16 FCC Rcd at 17263.

[16] *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004).

[17] Several other parties joined Sprint in seeking reconsideration of *Virginia Cellular*. An opposition to any of the three petitions for reconsideration had to be filed on or before March 4, 2004, and a copy of the opposition had to be served upon the parties. *See* 47 C.F.R. § 1.106(g). Verizon directed its latest comments directly at the merits of Sprint's petition for reconsideration of *Virginia Cellular*, but did not serve any of the parties to that proceeding. This is not the first time Verizon violated the *ex parte* rules in this manner. *See* Response to Opposition of Verizon, CC Docket No. 96-45, at 2-3 (May 14, 2004).

[18] *Highland Cellular, Inc.* 32 Communications Reg. (P&F) 233 (2004).

Supplement. By virtue of the Bureau's largess, the ARLECs may be able to preserve new issues for possible judicial review that would otherwise be foreclosed for their failure to properly present those issues first to the Bureau. *See 21st Century*, 318 F.3d at 199-200.

B. The Conduct Of The Bureau's Proceeding Violates §§ 1.115 And 1.1208 Of The Rules

The Bureau also ran afoul of the Commission's *ex parte* rules when it announced that its proceeding to "refresh" the record would be conducted as a "permit-but-disclose" proceeding pursuant to § 1.1206 of the Rules. *See Update PN*, at 3. At stake in the adjudicatory proceeding before the Commission is the CETC designation under which Cellular South currently receives high-cost support that is projected, by the ARLECs' reckoning, to total $545,442 in the third quarter of this year.[19] With the ARLECs asking the Commission to set aside Cellular South's designation,[20] the Application involves the "resolution of conflicting private claims to a valuable privilege." *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). Whatever the proceeding is called, *ex parte* presentations to Commission decision-makers on the merits of the Application were prohibited. *See id.* But when the proceeding is recognized as restricted under the *ex parte* rules, it is clear the matter cannot go forward under the permit-but-disclose procedures adopted by the Bureau.

An adjudicatory proceeding under § 214(e)(6) of the Act is not among those "exempt" proceedings in which *ex parte* presentations may be made freely. *See* 47 C.F.R. §§ 1.1200(a), 1.1204(a). Nor is it among those proceedings the Commission designated as "permit-but-disclose."

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[19] *See* Opposition to Supplement to Application for Review, CC Docket No. 96-45, at 20 n.32 (June 1, 2004) ("Cellular South Opp.").

[20] *See* Application, at 24.

See 47 C.F.R. § 1.1206(a). Consequently, this § 214(e)(6) adjudication is a restricted proceeding in which *ex parte* presentations are banned until the proceeding is no longer subject to Commission or judicial review. *See id.* § 1.1208.

We recognize the *ex parte* rules are subject to modification when the public interest so requires in a particular proceeding. *See* 47 C.F.R. § 1.2000(a); *Beehive Telephone, Inc. v. The Bell Operating Companies*, 12 FCC Rcd 17930, 17937-44 (1997). Modification is appropriate in a restricted proceeding if it "involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties." 47 C.F.R. § 1.1208, Note 2. This proceeding involves the adjudication of a dispute over the right of Cellular South to continue to receive a federal subsidy that may reach more than $2 million a year. Since the case involves a valuable right of one specific party, the *ex parte* rules should not have been modified, and especially not by the Bureau.

Moreover, the Bureau lacked the authority to convert this adjudication into a "permit-but-disclose" proceeding. Commission staff have the authority to modify the *ex parte* rules in those restricted proceedings in which the staff is authorized to act for the Commission under delegated authority. *See Beehive*, 12 FCC Rcd at 17937-38. So authorized, the staff can specify that permit-but-disclose procedures will apply in a restricted proceeding if it finds that the public interest so requires. However, both Congress and the Commission withheld the authority from the Bureau to act on applications for review of its own actions. *See* 47 U.S.C. § 155(c)(1); 47 C.F.R. § 0.291(d). Consequently, the Bureau was not authorized to act for the Commission in this case after the ARLECs sought Commission review. That left the Bureau without the power to make the determination under § 1.1200(a) that the public interest required that the proceeding be conducted under the permit-but-disclose procedures of § 1.1206.

Even if it was authorized to act, the Bureau failed to make the requisite public interest finding. The Bureau merely suggested that a "refreshed record will facilitate appropriate consideration" of the Application. *Update PN*, at 2. That is a far cry from determining that the public interest *required* that the parties refresh the record by written and oral *ex parte* presentations. Moreover, the Bureau explicitly acted pursuant to §§ 1.415, 1.419 and 1.1206, not § 1.1200(a). *See id.* at 2, 3. That demonstrates a misapprehension of the adjudicatory nature of this proceeding, as well as the applicability of the prohibition on *ex parte* presentations.

The Bureau could not transform this restricted adjudication into a permit-but-disclose proceeding for another reason. Section § 1.115 requires that an application for review, and a supplement to an application for review, be made in writing, by a specified deadline, and in conformance with the specific requirements as to the form of the papers, number of copies to be filed, and manner by which the papers are subscribed and verified. *See* 47 C.F.R. § 1.115(d), (f). In particular, the rule provides that an application for review and any supplement thereto "shall be filed" and "shall be served upon the parties to the proceeding." *Id.* Consequently, service must be made "on or before the day the document is filed." *Id.* § 1.47(b).

By plain implication, the same-day service requirement of § 1.115 forbids the *ex parte* presentation of written material to supplement an application for Commission review. *Cf. Sangamon Valley*, 269 F.2d at 224-25. In other words, § 1.115 prohibits what § 1.1206 permits. For example, § 1.115(f) would not allow a party to hand a supplement to an application for review to a Commission decision-maker, subject only to the requirement that the party submit two copies of its supplement to the Commission "no later than the next business day . . . for inclusion in the public record." 47 C.F.R.§ 1.1206(b)(1). Thus, absent a waiver of § 1.115, the Bureau could not modify

the *ex parte* rules in this particular case. But the Bureau was not empowered to waive § 1.115, and made no attempt to do so.

C. The Bureau's *Ad Hoc* Proceeding Must Be Terminated And The Supplemental Pleadings Dismissed

Under the *Accardi* doctrine, "[a]gency action that substantially and prejudicially violates the agency's rules cannot stand." *Sangamon Valley*, 269 F.2d at 224. Such is the case with the Bureau's departure from rules which speak with crystalline clarity to the procedures that must be followed once the Application was filed.[21] Because *ad hoc* departures from the Rules cannot be sanctioned, *see Reuters*, 781 F.2d at 950, the Commission should terminate the Bureau's permit-but-disclose proceeding and dismiss all the supplemental pleadings as improvidently invited.

The ARLECs note that Cellular South "supplemented" its petition for designation in response to the Bureau's *Update PN*,[22] when Cellular South's petition was not among Bureau's list of petitions and applications for review that could be supplemented. *See* Comments, at 2. Therefore, they maintain the Cellular South's supplement was "untimely." *Id.* at 2 & n.5. We tend to agree, but for the reason that the Bureau granted Cellular South's petition on November 27, 2002. Technically speaking, Cellular South had no pending petition to "supplement."

As it has explained, Cellular South was confused by the *Update PN* and concerned that the "rules" announced in *Virginia Cellular* and *Highland Cellular* would be applied retroactively despite

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[21] The Bureau's failure to abide by §§ 1.115 and 1.1208 has disrupted the review process, caused a proliferation of pleadings, increased the complexity and cost of the litigation, jeopardized Cellular South's due process rights, and undoubtedly delayed the final resolution of the dispute between the parties.

[22] *See* Supplement to Petition for Designation as an ETC in the State of Alabama, CC Docket No. 96-45 (May 14, 2004).

their invalidity.[23] Cellular South wanted the opportunity to demonstrate that it could easily meet the *Virginia Cellular* and *Highland Cellular* standards if it was subjected to them. *See id.* at 6. Had it had been confident that the ARLECs would supplement their Application, Cellular South would not have supplemented its petition. It would have "updated" the record in its opposition to the Supplement.

Cellular South's supplement to its already-granted petition is but one of the extraordinary and unnecessary filings engendered by the Bureau's failure to abide by § 1.115 and the Commission's established procedures for the orderly review of actions taken under delegated authority. Cellular South's post-grant supplement was admittedly "untimely." However, unlike the ARLECs' supplement to its pending application for review, it violated no rule to file a supplement to a petition that was no longer pending.

Cellular South's supplement should be dismissed along with all the other filings the Bureau invited. Cellular South requests that the Commission do just that and proceed to review the designation order in *Cellular South* on the papers that were properly filed and under the law that was in effect when the Bureau acted.

II. The Commission Does Not Have The Discretion To Adopt Substantive CETC Designation Rules By Adjudication

CenturyTel makes the astonishing claim that the Commission may impose "new designation requirements" on a CETC at any time through a rulemaking or adjudicatory proceeding. *See* Comments, at 7. Understandably, CenturyTel cites no precedent to support that contention since it comes close to saying that the Commission can do whatever it pleases. Because a designation as a

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[23] *See* Cellular South Opp., at 5-6.

CETC is a license under the APA, *see supra* note 6, the Commission's power to impose new designation requirements on a CETC is limited by the § 254(a) of the Act, the APA, the Rules, and ultimately by procedural due process.

A. § 254(a) Cannot Be Read To Permit The Adoption Of Universal Service Rules In Adjudicatory Proceedings Under § 214(e)(6)

The plain language of § 254(a) lays waste to CenturyTel's claim that the Commission has unbridled discretion to promulgate CETC designation rules in an adjudicatory proceeding. It unambiguously mandates that all new universal service rules emanate from the recommendations of the Federal-State Joint Board on Universal Service ("Joint Board").

Section 254(a) provides in mandatory terms that the Commission "*shall* institute and refer to" the Joint Board "a proceeding to recommend changes to any of its regulations in order to implement" §§ 214(e) and 254. 47 U.S.C. § 254(a)(1) (emphasis added). It also provides that the Joint Board shall make its recommendations to the Commission "after notice and opportunity for public comment." *Id.* Under § 254(a), the Commission was relegated the task of initiating "a single proceeding to implement the recommendations from the Joint Board." *Id.* § 254(a)(2).

Congress included deadlines in § 254(a) that dictated that the rulemaking process must begin with the Joint Board. It was given until November 8, 1996 to conduct a notice-and-comment proceeding and then make its recommendations to the Commission. *Id.* § 254(a)(1). The Commission in turn had until May 8, 1997 to implement the Joint Board's recommendation by establishing "rules." *Id.* § 254(a)(1).

Congress required that any subsequent changes to the universal service rules be preceded by the same rulemaking process. After May 8, 1997, the Commission was commanded to "complete

any proceeding to implement subsequent recommendations from the Joint Board on universal service within one year after receiving such recommendations." *Id.* § 254(a)(2). Thus, Congress specified both the rulemaking process to be employed and the time within which the process had to be completed.

The statutory rulemaking process was prescribed with such specificity in § 254(a) that the Commission was left with no discretion to deviate from the process, much less to impose new ETC designation rules "at any time" through an adjudicatory proceeding. CenturyTel Comments, at 7. To permit the Commission to adopt CETC designation rules piecemeal in CETC designation cases would defeat the purpose for which Congress designed its rulemaking process.

Congress revealed its intentions by adding a state-appointed utility consumer advocate to the Joint Board.[24] By explicitly directing that the Joint Board recommend rule changes and the Commission "implement" those recommendations, Congress obviously intended that universal service issues be aired publicly before an advisory body representing state and consumer interests, and that the subsequent recommendations of that body provide the policy framework on which the Commission promulgates universal service rules. Congress could not have intended that the Commission be able to bypass the Joint Board, and avoid the statutory rulemaking process altogether, by promulgating universal service rules in adjudicatory proceedings in which the interests of the states and consumers are not necessarily represented.

B. Rules Adopted By A § 254(a) Rulemaking Only Can Be Changed Or Repealed By A § 254(a) Rulemaking

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[24]The Joint Board was established by Congress in 1988 to include state commissioners for the purpose of acting as an advisory body with respect to federal-state telecommunications matters. *See* 47 U.S.C. § 410(c). In 1996, Congress reconstituted the Joint Board with the addition of a state-appointed utlity consumer advocate. *See id.* § 254(a)(1).

CenturyTel's argument assumes the Commission's discretion to proceed by rulemaking or adjudication extends to promulgating substantive rules in violation of statutory notice-and-comment requirements. However, no federal agency has that discretion. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-64 (1969) (plurality) (agency cannot promulgate new rules in adjudicatory proceedings without complying with APA rulemaking requirements). Like all federal agencies, the Commission must obey the APA. *See Sprint Corp. v. FCC,* 315 F.3d 369, 377 (D.C. Cir. 2003) (case remanded for Commission's "utter failure" to follow notice-and-comment procedures); *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1236 (D.C. Cir. 1994) (rule set aside for violating notice-and-comment requirements).

The APA provides that when an agency proposes to promulgate a legislative (or substantive) rule, it must give notice to interested parties and allow them an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b)-(c). Failure to follow the notice-and-comment procedures of the APA is grounds for invalidating the rule. *See National Organization of Veterans' Advocates v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).[25]

An APA notice-and-comment rulemaking is required before the Commission can adopt "new rules that work substantive changes in prior regulations are subject to the APA's procedures," *Sprint,* 315 F.3 at 374, or "a new position inconsistent with any . . . existing regulation." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995). The APA also requires the Commission "to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation." *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). *See*

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[25]Agencies need not comply with the APA notice-and-comment requirements in certain instances, but not "when notice . . . is required by statute." 5 U.S.C. § 553(b). Notice and opportunity to comment are required before any ETC rules are recommended by the Joint Board and adopted by the Commission. *See* 47 U.S.C. § 254(a).

Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Finally, the Commission must conduct a rulemaking to repeal a rule it adopted by rulemaking. *See* 5 U.S.C. §§ 551(5), 553; *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982).

As we have seen, Congress specified the precise notice-and-comment procedures that the Commission must employ to adopt or change the rules applicable to CETC designations under § 214(e)(6). *See supra* pp. 12-13. Thus, to make substantive changes in the ETC designation rules that were promulgated under the notice-and-comment rulemaking procedures of § 254(a), the Commission must employ the same procedures, as demonstrated by what Verizon calls the "pending portability rulemaking." Comments, at 1.[26]

C. Retroactive Application Of New CETC Designation Requirements To Cellular South Would Violate § 155(c) Of The Act And § 1.115(c) Of The Rules

CenturyTel contends that "the FCC may impose new designation requirements on a CETC at any time - - even after the FCC initially designated the carrier as a CETC." Comments, at 7. Verizon and the ARLECs assume that the *Virginia Cellular* and the *Highland Cellular* requirements can be applied against a designated CETC. *See* Verizon Comments, at 14-15; ARLECs' Comments, at 3-7. CenturyTel's contention is incorrect, as are the assumptions of Verizon and the ARLECs.

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[26]Recognizing that a § 254(a) notice-and-comment rulemaking was necessary to make substantive changes in the rules governing the ETC designation process, the Commission requested the Joint Board to examine the process for designating ETCs. *See Federal-State Joint Board on Universal Service*, 17 FCC Rcd 22642, 22647 (2002). The Joint Board entertained public comment on the factors the Commission should consider when it performs ETC designations, *see Joint Board Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and ETC Designation Process*, 18 FCC Rcd 1941, 1955 (Joint Bd. 2003), and it has made its recommendations to the Commission. *See Federal-State Joint Board on Universal Service*, 19 FCC Rcd 4257 (Jt. Bd. 2004). Recently, the Commission solicited comment on the Joint Board's recommendations. *See Federal-State Joint Board on Universal Service*, FCC 04-127 (June 8, 2004).

Both § 155(c)(5) of the Act and § 1.115(c) of the Rules prohibit the grant of any application for review "if it relies on questions of fact or law upon which" the delegated authority "has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c). *See* 47 U.S.C. § 155(c)(5). That prohibition reflects the judgment of Congress that the interests of the orderliness and efficiency in the administrative review process are paramount to the interest of a litigant in raising matters for the first time before the Commission. Thus, the *Virginia Cellular* and *Highland Cellular* requirements were announced too late to be applied in this case against Cellular South.

D. The Retroactive Application Of New CETC Designation Requirements To A CETC Would Violate Due Process

Contrary to CenturyTel's view, the risk that the CETC designation rules could "change prospectively" is of no concern. *See* Comments, at 7. At issue is whether designation rules promulgated in a notice-and-comment rulemaking can be changed through adjudication and, if so, whether the rule changes can be applied retroactively. Section 254(a) of the Act works in conjunction with the APA to prevent the Commission from using an adjudicatory proceeding to make substantive changes to CETC designation *rules* adopted in accordance with statutory notice-and-comment procedures. *See supra* pp. 14-15. On the other hand, procedural due process protects CETC *designations* from the retroactive application of new CETC designation *requirements*.

Currently, there is no law to support CenturyTel's assertion that "CETC status is not an entitlement." Comments, at 8. Certainly, it can be said that no carrier is entitled to be designated a CETC. In contrast, a CETC designation, once conferred, may be considered an entitlement.

Statutorily created benefits are "a matter of statutory entitlement for persons qualified to receive them." *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Such entitlements are protected by the

constitutional guarantee of procedural due process. *See id.* at 262-63. Considering that a CETC designation is a benefit created by § 254 of the Act and conferred under § 214(e)(6), a carrier can claim a protected interest in its CETC designation. For example, a rulemaking conducted in violation of § 254(a) or the APA, which deprives a carrier of a valuable CETC designation, could be challenged under the Fifth Amendment.

Under certain circumstances, the Commission can give retroactive effect to "adjudications that modify or repeal rules established in earlier adjudications." *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). However, in *Virginia Cellular* and *Highland Cellular*, the Commission modified or repealed rules that were promulgated in a notice-and-comment rulemaking conducted in accordance with § 254(a) of the Act and APA § 553.[27] That was unlawful in and of itself. *See supra* pp. 12-15. Assuming that the requirements of *Virginia Cellular* and *Highland Cellular* are enforceable at all, the issue is whether their retroactive application to an already-designated CETC would violate due process. *See generally Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) Kennedy, J., concurring) (testing retroactive legislation under the Due Process Clause).

The courts have rejected CenturyTel's claim that the Commission may "always and without limitation" give retroactive effect to its "quasi-judicial" determinations. *Verizon*, 269 F.3d at 1109. Courts balance various factors to determine whether the Commission can apply a ruling retroactively. *See, e.g., Farmers Telephone Co., Inc. v. FCC*, 184 F.3d 1241, 1251 (D.C. Cir. 1999). In applying a multi-factor test, there has emerged a basic distinction between (1) "new applications of existing law, clarifications, and additions," and (2) the "substitution of new law for old law that

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[27] *See* Cellular South Opp., at 12-16.

was reasonably clear." *Id.* (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). The governing principle is that new applications of existing law may be applied retroactively, but the substitution of new law for old law may be given prospective-only effect. *See Verizon*, 269 F.3d at 1109.

In *Virginia Cellular*, there was an abrupt break from rules that emerged from the rulemaking to implement §§ 214(e) and 254 of the Act. In 1997, the Commission construed the provisions of § 214(e) to prohibit both it and state commissions from adopting criteria for designating ETCs in addition to those set out in § 214(e)(1). *Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8851-52 (1997) ("*Universal Service Order*"). The Commission explained:

> Read together, we find that these provisions dictate that a state commission must designate a common carrier as an [ETC] if it determines that the carrier has met the requirements of section 214(e)(1). Consistent with the Joint Board's finding, the discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one [ETC] in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional [ETC] is in the public interest. The statute does not permit this Commission or a state commission to supplement the section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal service support.[28]

In *Virginia Cellular*, the Commission read the language of § 214(e)(6), which was unchanged and virtually identical to that of § 214(e)(2), to permit it to supplement the § 214(e)(1) eligibility criteria. *See* 19 FCC Rcd at 1584 n.141. Based solely on *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999) *("TOPUC")*, the Commission jettisoned the interpretation of §

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[28] *Universal Service Order,* 12 FCC Rcd at 8852.

214(e) that it formally adopted in its *Universal Service Order*.[29] It simply stated that it did not "believe" that designation of a CETC in a non-rural area based merely upon a showing that the requesting carrier complied with § 214(e)(1) of the Act "will necessarily be consistent with the public interest in every instance." *Virginia Cellular*, 19 FCC Rcd at 1575. Moreover, relying exclusively on *TOPUC*, the Commission discovered that nothing in § 214(e)(6) of the Act prohibited it from "imposing additional conditions on ETCs." *Id.* at 1584 n.141.

Based on its new beliefs, the Commission overruled *Cellco Partnership d/b/a Bell Atlantic Mobile*, 16 FCC Rcd 39 (Com. Car. Bur. 2000) and its progeny,[30] where the Bureau had "found designation of additional ETCs in areas served by non-rural telephone companies to be *per se* in the public interest based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) of Act." *Virginia Cellular*, 19 FCC Rcd at 1575 & n.84. The Commission ostensibly left intact its "policy of promoting competition in all areas, including high-cost areas,"[31] since that policy was congressionally-generated and embedded in §§ 214(e) and 254.[32]

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[29]Because there is no "nonmutual collateral estoppel" against the Government, a single circuit court cannot determine the meaning of an ambiguous statute for the entire nation by imposing an interpretation that the agency must follow outside of the court's jurisdiction. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984). For that reason, the Commission was not required to follow the Fifth Circuit's approach to § 214(e)(2) nationwide. *See Holland*, 309 F.3d at 810. It certainly was under no obligation to follow *TOPUC* when it acted in *Virginia Cellular*, since its decision could not be subject to the jurisdiction of the Fifth Circuit. Therefore, the Commission could not simply acquiesce to *TOPUC*.

[30]*See Farmers Cellular Telephone, Inc.*, 18 FCC Rcd 3848, 3858 (Wireline Comp. Bur. 2003); *Corr Wireless Communications, LLC*, 17 FCC Rcd 21435, 21440 (Wireline Comp. Bur. 2002); *Pine Belt Cellular, Inc.*, 17 FCC Rcd 9589, 9594 (Wireline Comp. Bur. 2002).

[31]*E.g., Cellular South*, 17 FCC Rcd at 24403.

[32]*See, e.g., Cellco*, 16 FCC Rcd at 45-46 & n.41.

Prior to *Virginia Cellular*, the Commission had no "stringent" public interest standards and requirements. It did not require a requesting carrier to demonstrate that its designation as a CETC under § 214(e)(6) would be consistent with the public interest. *See Section 214(e)(6) PN*, 12 FCC Rcd at 22948-49. *See also Virginia Cellular*, 19 FCC Rcd at 1556 (listing five requirements for § 214(e)(6) ETC designation). Aware that the Joint Board was in the process of developing recommendations as to what factors the Commission should consider when it performs ETC designations under § 214(e)(6), *see supra* note 26, the Commission proceeded to adopt a "more stringent public interest analysis for ETC designations in rural telephone company service areas." *Virginia Cellular*, 19 FCC Rcd at 1565.

In *Highland Cellular*, the Commission overruled *RCC Holdings* to the extent the Bureau found that the public interest was served by the designation of RCC as a CETC for portions of three wire centers of rural telephone companies. *See* 32 Communications Reg (P&F) at 244 & n.100. The Commission concluded that making designations for a portion of a rural wire center "would be inconsistent with the public interest," and that "the competitor must commit to provide the supported services to customers throughout a minimum geographic area." *Id.* at 244-45.

In *Petitions for Reconsideration Western Wireless Corporation's Designation as an ETC in the State of Wyoming*, 16 FCC Rcd 19144, 19149 (2001), the Commission held that any concern regarding "cream-skimming" was "substantially eliminated" by a rural telephone company's option of disaggregating and targeting high-cost support below the study area level. Pirouetting in *Highland Cellular*, the Commission rejected "arguments" that disaggregation can protect incumbents against cream-skimming "in every instance." 32 Communications Reg. (P&F) at 244.

By *Virginia Cellular* and *Highland Cellular*, the Commission repudiated a fundamental

statutory interpretation it had adopted in a § 254(a) rulemaking, and abruptly changed its CETC designation rules. To retroactively apply the new rules to a carrier that had been designated a CETC in accordance with the law that was in effect, thereby denying it of the high-cost support on which it relies, would work a "manifest injustice." *Verizon*, 269 F.3d at 1109 (quoting *Clark-Cowlitz Joint Operating Authority v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc)). Under these circumstances, it would offend due process for the Commission to enforce the *Virginia Cellular* and *Highland Cellular* rules retroactively to deprive Cellular South of its protected interest in receiving universal service support.

III. The Commission's New Interpretation Of § 214(e)(6) Is Erroneous And Unenforceable

CenturyTel and particularly Verizon argue that the Commission got it right in *Virginia Cellular* when it discovered for the first time that § 214(e) of the Act required an applicant for CETC designation to demonstrate that its designation in a non-rural area is "consistent with the public interest and necessity" under § 214(e)(6). *See* CenturyTel Comments, at 89; Verizon Comments, at 6-14. As was the case with the Commission in *Virginia Cellular*, neither CenturyTel nor Verizon can explain how the Commission got it is so wrong in 1997 in the *Universal Service Order*. Nor did they explain how the Bureau could have consistently misread the statute to make the designation of a CETC in a non-rural area be *per se* in the public interest based upon a demonstration that the requesting carrier complies with § 214(e)(1). *See supra* note 30. One thing is for certain: there has been no change in § 254(e) since 1997.

Verizon tries to sidestep the legislative history of § 214(e). *See* Verizon Comment, at 12. However, the legislative history made it "plain" that § 214(e) treats CETC applicants for non-rural

areas differently than applicants for rural areas:

> . . . [U]pon request, a State commission is required under new section 214(e)(2) to designate a common carrier that meets the requirements of new section 214(e)(1) as an [ETC]. *If more than one common carrier that meets the requirements of new section 214(e)(1) requests designation as an [ETC] in a particular area, the State commission shall, in the case of areas not served by a rural telephone company, designate all such carriers as eligible.* If the area for which a second carrier requests designation is served by a rural telephone company, then the State commission may only designate an additional carrier as an [ETC] if the State commission first determines that such additional designation is in the public interest.[33]

Verizon employs various canons of statutory construction to avoid the language and legislative history of § 214(e). *See* Verizon Comments, at 8-12. However, if one considers the "language and design" of the Telecommunications Act of 1996 ("1996 Act") "as a whole," in addition to the language of § 214(e), it becomes perfectly clear that the Commission correctly construed the statute in 1997 and that construction does not lead to "entirely absurd results." Verizon Comments, at 8, 10.

In its *Universal Service Order*, the Commission construed § 214(e)(2) to achieve the pro-competitive goal of the 1996 Act to open of "all telecommunications markets to competition."[34] For example, the Commission held that the imposition of additional obligations on competitive carriers as a condition of ETC eligibility would "chill competitive entry into high cost areas."[35] In a similar

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[33]H.R. Conf. Rep. No. 104-458, at 141 (1996) emphasis added).

[34]*Universal Service Order*, 12 FCC Rcd at 8781. The Commission "intended to encourage the development of competition in all telecommunications markets." *Id.* at 8782.

[35]*Id.* at 8858 (quoting *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 87, 170 (Joint Bd. 1996)).

vein, it held that a state's refusal to designate an additional ETC on grounds other that the § 214(e)(1) criteria could "prohibit or have the effect of prohibiting the ability of any entity" to provide a telecommunications service in violation of § 253 of the Act.[36]

In *Cellco*, the Bureau also read § 214(e) in light of the pro-competitive goal of the 1996 Act when it adopted its *per se* rule. *See* 16 FCC Rcd at 45-46 & n.41. The Bureau explained, "In requiring the Commission to designate, upon request and where the state commission lacks jurisdiction, more than one common carrier in areas served by non-rural carriers, we believe Congress recognized that the promotion of competition is consistent with the public interest in those areas served by non-rural areas." *Id.* at 46. That interpretation of § 214(e)(6) leads to results largely consistent with the language of the provision and the pro-competitive intent of the 1996 Act.

In enacting the 1996 Act, and specifically § 214(e)(6), Congress created the statutory presumption that competition is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 214(e)(6). The statutory presumption is conclusive with respect to an application for designation as a CETC in a non-rural area, provided that the applicant meets the statutory eligibility requirements of § 214(e)(1). Hence, the mandatory language of § 214(e)(6) that the Commission "shall" designate a CETC in all areas other than an area served by rural telephone company. *Id.* § 214(e)(6).

In the case of a request for designation as a CETC in a rural area, the statutory presumption is rebuttable. The presumption is sufficient to make out a *prima facie* case that a CETC designation in a rural area would serve the public interest. The legal effect of the presumption is simply to shift

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[36] *Universal Service Order*, 12 FCC Rcd at 8852 (quoting 47 U.S.C. § 253(b)).

the burden to an incumbent rural LEC to prove that the designation of a CETC in the rural area would be inconsistent with the public interest.[37] If no such carrier comes forward to oppose the CETC designation, or if a carrier intervenes but fails to rebut the statutory presumption, the Commission "may" find that the CETC designation for a rural area is consistent with the public interest, provided again that the CETC applicant is eligible under § 214(e)(1). *See* 47 U.S.C. § 214(e)(6). On the other hand, if the rural LEC intervenes and rebuts the statutory presumption, the Commission "may" not make the designation for a rural area. *See id.*

We submit that the foregoing interpretation of the statute is consistent with the pro-competitive policy of the 1996 Act, conforms with the legislative history of § 214(e), gives effect to the explicit language of § 214(e)(6), and will not conduce to "absurd results." In contrast, the Commission's new reading of the statute could lead to such results. For example, under Verizon's version of the *Virginia Cellular* construction of § 214(e)(6), the Commission would have the discretion to deny an CETC application for a non-rural area "even if the grant of application would be 'consistent with the public interest, convenience and necessity.'" Verizon Comments, at 9-10. Congress could not have intended such an absurd result to flow from an exercise of the Commission's duty to administer a pro-competitive statute in the public interest.

We submit that the Commission erred in *Virginia Cellular* when it repudiated its prior construction of § 214(e)(6) and overruled the *Cellco per se* rule. Thus, the Commission's new construction of § 214(e)(6) is unenforceable both as contrary to the statute and unlawfully adopted

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[37]The incumbent rural LEC is the logical proponent of a finding that the designation of CETC would cause harms cognizable under the Act. *See General Plumbing Corp. v. New York Telephone Co.*, 11 FCC Rcd 11799, 11809 n.63 (Com. Car. Bur. 1996). *Cf.* 5 U.S.C. § 556(d). Furthermore, operative facts concerning the impact of the designation on the rural LEC's service to its subscribers would be peculiarly within its power to produce. *See, e.g., United Telephone Co. of Ohio*, 26 FCC 2d 417, 421 (1970).

in an adjudicatory proceeding.

IV. The ARLECs Have Not Carried Their Burden To Show That The Bureau's Action Should Be Reviewed

The Bureau's designation of Cellular South as a CETC was effective on December 4, 2002, the day on which the Bureau's order was released. *See* 47 C.F.R. § 1.102(b)(1). The ARLECs could have sought reconsideration and asked the Bureau to stay the effectiveness of its order. *See id.* § 1.102(b)(2). Likewise, when they filed their Application, they could have sought a stay from the Commission. *See id.* § 1.102(b)(3). The ARLECs chose not to seek a stay, and the Commission has not exercised its discretion to stay the Bureau's designation order. *See id.* Consequently, the Bureau's action has remained in effect for nearly 1½ years, during which time Cellular South received high-cost support.[38]

The ARLECs have asked the Commission to set aside Cellular South's designation as a CETC, presumably terminating the universal support payments Cellular South currently receives. *See* Application, at 25; Supplement, at 13. Thus, they carried the burden of demonstrating that such draconian action is warranted under § 1.115 of the Rules.[39]

A. There Are No Policy Reasons To Rescind Cellular South's Designation

The ARLECs have not attempted to show that the Bureau ran afoul of an *established* policy. They challenge the Bureau's decision to continue to designate CETCs pending the Commission's consideration of the "broader issues" raised by the recent recommended decision of the Joint Board.

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[38] *See* Cellular South Opp., at 16.

[39] The ARLECs had to show that the Bureau's action: (1) conflicts with the Act, the Rules, case precedent, or established Commission policy; (2) involves an unresolved question of law or policy; (3) implicates a precedent or policy that should be overturned; (4) rests on an erroneous finding of material fact; and/or (5) is tainted by a prejudicial procedural error. *See* 47 C.F.R. § 1.115(b)(2).

Supplement, at 2. But that decision is consistent with current Commission policy as evidenced by *Virginia Cellular* and *Highland Cellular*. Thus, the ARLECs are asking the Commission to overturn both the Bureau's action and its own policy.

The Commission has adopted the policy of continuing the process of designating CETCs subject to the caveat that rules relating to high-cost support may be adopted in the pending proceeding which could "potentially impact" the support the CETCs "may receive in the future." *Virginia Cellular*, 19 FCC Rcd at 1577-78; *Highland Cellular*, 32 Communications Reg. (P&F) at 242. The Alabama CETCs currently receive high-cost support, but the ARLECs have not alleged that there has been any cognizable impact on the USF. Nor have they advanced a reason why it was unreasonable for the Commission to express confidence that, if necessary, rules can be promulgated that will operate prospectively to protect the USF. Despite numerous opportunities, the ARLECs have failed to show that the Commission's policy choice, and the Bureau's before it, should be "overturned or reversed." 47 C.F.R. § 1.115(b)(2)(iii).

B. The Application Must Be Decided Under Currently Applicable Law

The ARLECs specifically requested the Commission to set aside the Bureau's orders in this case and *RCC Holdings*, and "defer" a decision on all other pending Alabama ETC petitions, "until it issues a final rule establishing a framework for determining the 'overall impact' on the [USF] that overlapping ETC petitions will have on its sustainability and purpose." Supplement, at 7. They readily admitted that the Commission is currently considering the Joint Board's recommendation that such a rule be proposed for adoption in a rulemaking. *See id.* at 2. Thus, the ARLECs are contending that authorizations to receive an explicit federal "subsidy" should be rescinded simply because of the possibility that the Commission may adopt a rule that would limit the size of the

subsidy if funding yet-to-be-designated CETCs someday strains the USF. To rescind Cellular South's designation on such grounds would be unprecedented and contrary to fundamental principles of administrative law.

The ARLECs failed to cite a single instance when the Commission set aside an authorization based on the mere possibility that a yet-to-be-proposed rule may be adopted. In any event, the Commission cannot penalize Cellular South by cutting off its support, but at the same time deferring the issue of whether it should get support to a future rulemaking. That would be "similar to a judge dismissing a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable." *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). In other words, the Commission cannot avoid its obligations as a adjudicator under §§ 155(c)(4) and 214(e) of the Act "by looking to a rulemaking, which operates only prospectively." *Id.*; *MCI Telecommunications Corp. v. FCC*, 10 F.3d 842, 847 (D.C. Cir. 1993).

To grant the Application, but defer consideration of its merits to a rulemaking, would run afoul of the *Accardi* doctrine, under which the Commission "is bound to follow its existing rules until they have been amended pursuant to the procedures specified by [the APA]." *Amendment of Part 74, Subpart K, of the Commission's Rules*, 22 FCC 2d 586, 591 (1969). Until it adopts the rules it has proposed in a rulemaking, the Commission's "existing rules must govern the rights and obligations of those subject to its jurisdiction." *CSRA Cablevision, Inc.*, 47 FCC 2d 567, 575 (1974). Therefore, it cannot depart from its existing rules to rescind an authorization, "even to achieve laudable aims." *Reuters*, 781 F.2d at 950. It may rescind Cellular South's designation only if recission is warranted "under the law currently applicable."

The ARLECs have failed to show that the Bureau's decision to grant Cellular South's petition for CETC designation is "in conflict with statute, regulation, case precedent, or established Commission policy." 47 C.F.R. § 1.115(b)(2)(i). That being the case, the Commission cannot deprive Cellular South of the high-cost support it currently receives by *retroactively* enforcing a rule that may or may not be adopted, but if adopted will operate only *prospectively*.

C. The Designation Of Cellular South Has Not Impacted The USF

Congress specified six universal service principles on which the Commission must base it policies, *see* 47 U.S.C. § 254(b)(1)-(6), and it authorized the adoption of such additional principles that the Joint Board and the Commission determine are necessary and appropriate. *See id.* § 254(b)(7). The principle that the USF must be "sustainable" is not among the universal service principles specified by Congress, and the Joint Board and the Commission have not adopted fund sustainability as an additional principle.[40] Until a "sustainability" principle is adopted in conjunction with the Joint Board, the Commission cannot base its universal service policies upon a concern about the long-term impact that CETC designations will have on the USF, and it certainly cannot base its decision-making exclusively on any such concern. *See Qwest*, 258 F.3d at 1200 (Commission "may exercise its discretion to balance the principles against one another . . . but may not depart from them altogether to achieve some other goal"). Nevertheless, the ARLECs have treated USF sustainability as the dispositive consideration in this case.

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[40] *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 n.7 (10th Cir. 2001) (noting the Commission and the Joint Board have not adopted an explicit principle to limit funding); *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22582 (2003) (declining to adopt an explicit principle under § 254(b)(7) that burdens on contributors should be minimized).

Beyond blustering about the specter of "an endless number of wireless ETC applications,"[41] the ARLECs produced no statistical evidence showing that Cellular South's designation has had any significant impact on the USF. Nor have they shown that the designation will have a long-term impact on the fund. To the contrary, Cellular South's projected support will make up only 0.003 percent of the total high-cost support to all ETCs,[42] and 0.102 percent of the total high-cost support to all Alabama ETCs.[43] That level of support is sustainable going forward. If that proves not to be the case in the future, the Commission has the rulemaking authority to take action to protect and sustain the USF, including the authority to examine the basis of support for rural LECs that currently draw well over 90 percent of all high-cost support.

D. The ARLECs Have Not Shown Harm To Consumers

The Bureau found that the ARLECs had not proffered "persuasive evidence" that Cellular South's designation as a CETC would "reduce investment in infrastructure, raise rates, reduce service quality to consumers in rural areas or result in loss of network efficiency." *Cellular South*, 17 FCC Rcd at 24403. Noting that the ARLECs had "merely presented data regarding the number of loops per study area, the households per square mile in their wire centers, and the high-cost nature of low-density rural areas," the Bureau concluded that the "evidence submitted is typical of most rural areas and does not, in and of itself, demonstrate that designation of Cellular South . . . will harm the affected rural telephone companies." *Id.* Nevertheless, in their Supplement, the ARLECs trotted out the very same evidence, simply couched in the language of *Virginia Cellular*, to allege that the

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[41] Supplement, at 6.

[42] *See* Cellular South Opp., at 20.

[43] This estimate is based on Cellular South's projected support of $9,161 per month measured against $8,944,377 per month in projected high-cost support to all carriers in Alabama, as shown on USAC's web site.

designation of multiple wireless CETCs could cause unspecified "harms" to a rural LEC. *See* Supplement, at 11-12 & nn.41, 43, 45. However, they failed to allege, much less show, that the Bureau erred when it found their evidence insufficient to make a *prima facie* case of competitive harm. *See id.* at 11-13.

The ARLECs resorted to speculating that the overall impact of having six wireless CETCs in Alabama "may be the creation of a 'great disparity in density' between the wire centers sought to be served and the ones left unserved by Alabama CETCs." *Id.* at 12 (quoting *Virginia Cellular*, 19 FCC Rcd at 1579). "If this is the case," the ARLECs suggested that an "affected" rural LEC "could be placed at a 'sizeable unfair competitive disadvantage.'" *Id.* (quoting *Virginia Cellular*, 19 FCC Rcd at 1580). Speculating further, they maintained that the service offerings of multiple wireless CETCs "could have an overall effect of taking funding away" from a rural LEC, which "could also delay the deployment of advanced services throughout the study area." *Id.* at 12-13. Such unsupported, generalized claims amounted to pure conjecture.

The ARLECs made no specific allegations of fact in their Supplement sufficient to show that the designation of Cellular South as a CETC has produced, or will produce, any harms whatsoever. Instead, the ARLECs simply asserted that Cellular South had not demonstrated that the benefits of its universal service offering outweigh "these harms." *Id.* at 13. In effect, the ARLECs attempted to shift the burden to Cellular South to prove both the benefits of its CETC designation and the absence of any countervailing "harms." Since Cellular South carried its burden of persuading the Bureau that its designation will provide benefits to rural consumers, *see Cellular South,* 17 FCC Rcd at 24402-06, the burden shifted to the ARLECs to persuade the Bureau, and now the Commission, that the designation causes, or will cause, harm to rural LECs that outweighs the established benefits

to rural consumers. *See supra* note 37. Yet, the ARLECs came forward with no facts on which the Commission can find that the economic effect of Cellular South's universal service offering will be to "significantly undermine" any rural LEC's "ability to serve its entire study area." *Virginia Cellular*, 19 FCC Rcd at 1580.

The Commission cannot afford any weight to the ARLEC's bare assertion that the designation of Cellular South as a CETC will bring significant harm to any rural LEC. Even if such harm were demonstrated, the Commission's concern should be potential harm to rural consumers, not rural LECs. As the Fifth Circuit held:

> The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*.[44]

The Commission should hark back to the period when incumbent wireless carriers attempted to forestall competition with claims similar to those made by the ARLECs. The Commission held "[t]hat an existing carrier might be affected adversely by the entry of a competing carrier is not our chief concern. Injury to the overall public interest and the public's ability to receive adequate communications services are the circumstances to be avoided." *Commonwealth Telephone Co.*, 61 FCC 2d 246, 253 (1976).

To support an allegation that competition would have an "adverse economic impact," the Commission required a petitioner to plead "specific factual data" sufficient to make out a *prima facie* case that "grant of the application would (1) result in substantial financial losses to the petitioner,

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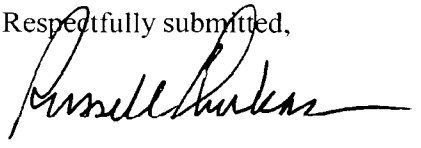
[44] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (emphasis in original).

(2) that these losses would compel the petitioner to curtail some of its . . . services, and (3) that this loss of service would not be offset by the new services to be provided by the applicant." *Commonwealth Telephone*, 61 FCC 2d at 252, 253. The purpose of the pleading requirement was to assure that the public did not "suffer a net loss of vital communications services." *Id.* at 253. A similar requirement should be enforced today for the same purpose.

As we have shown, the Act creates a presumption that competition in the local telecommunications markets serves the public interest. *See supra* pp. 23-24. In light of that presumption, the Bureau was correct when it placed the burden on the ARLECs to plead facts sufficient to "undermine the Commission's policy of promoting competition in all areas, including high-cost areas." *Cellular South Holdings*, 17 FCC Rcd at 23542. By their comments, the ARLECs failed for the fourth time to make a *prima facie* case that Cellular South's designation as a CETC "will lead to an overall derogation of service to the public." *Commonwealth Telephone*, 61 FCC 2d at 252-53.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 9th day of June, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Reply Comments* filed today to the following:

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